SUPREME COURT, U. S.

MOTION FILED OCT 21 1959

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 4 ORIGINAL

STATE OF NEW YORK
Complainant,

against

STATE OF ILLINOIS and SANITARY DISTRICT OF CHICAGO,
Defendants.

MOTION FOR LEAVE TO FILE A SUPPLEMENTAL AND AMENDED COMPLAINT

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STATE OF NEW YORK, *Complainant,* *against* STATE OF ILLINOIS AND SANITARY DISTRICT OF CHICAGO, *Defendants.*	October Term, 1959 No. 4 Original MOTION FOR LEAVE TO FILE A SUPPLEMENTAL AND AMENDED COMPLAINT

Complainant, State of New York, moves this Court for leave to file a supplemental and amended complaint, a copy of which is attached hereto, in accordance with this Court's decree in *New York* v. *Illinois* (274 U. S. 488) on the ground that the subject matter of certain allegations then stricken as prematurely raised, have now become of immediate relevance, and that New York is now in position to show present injury to itself, its citizens and agencies at a hydroelectric plant currently in full operation on the St. Lawrence River, and at a hydroelectric plant now under construction and to be completed in the near future on the Niagara River. These plants have been and are being constructed and operated by Power Authority of the State of New York (hereinafter, the "Power Authority"), a corporate municipal instrumentality of the State of New York, and a political subdivision of the State exercising governmental and public powers (see N. Y. Public Authorities Law, §1002).

Complainant moves on the further ground that certain facts alleged in the original complaint have been altered,

modified and affected by events, changes and developments occurring in the 33 years which have intervened since the date of the original complaint, including the construction of the St. Lawrence Seaway which opened in May 1959 and which, by providing a 27 foot draft channel to the sea, made the Great Lakes a major international waterway. The Power Authority expended over $203,000,000 at the St. Lawrence project on facilities jointly necessary for Seaway and power purposes. In addition to changes resulting from the power and Seaway projects, widespread public recreational uses of the Great Lakes waters and shores have developed in such period.

The changed facts and circumstances make appropriate a supplemental and an amended complaint so that this Court and its Special Master (the Honorable Albert B. Maris, now designated to hear and to report on the issues raised by the complaint in Original No. 12 and the Amended Application to reopen the decree in Original Nos. 2, 3, and 4) may consider the effects of diversions from Lake Michigan by Illinois and its agencies on the interests of the State of New York, its agencies and its citizens, in the light of conditions as they exist today based upon a relevant pleading which presents the issues in conformity with the rules of the Court.

Complainant's original complaint in this action was filed on October 18, 1926. A decree was entered herein on April 21, 1930 (281 U. S. 696). On June 29, 1959 this Court granted the amended application of this complainant and others to reopen such decree, and appointed Hon. Albert B. Maris, Senior United States Circuit Judge for the Third Circuit, as Special Master to hear this and other cases involving diversions by Illinois from the Great Lakes.

This complainant's original complaint herein contained allegations relating to the effect of a diversion of waters

from Lake Michigan on the use of the waters of the Niagara and St. Lawrence Rivers by the complainant and its citizens for the development of power. Such allegations were stricken from the original complaint on May 31, 1927 on the ground that they did not "show that there is any present use of the waters for such purposes which is being or will be disturbed; nor that there is any definite project for so using them which is being or will be affected." (274 U. S. 488, 489). Such ruling was expressly, however, "without prejudice, so that the plaintiff State [New York], if later on in a position to do so, may be free to litigate the questions which the paragraph is intended to present." (p. 490)

Since the date of said ruling and the subsequent decree of April 21, 1930, there has been extensive development of the St. Lawrence and Niagara Rivers by an agency of the State of New York, as is more fully set forth below, which makes it proper that the allegations relating to hydroelectric losses to the complainant be restored to the pleadings as contemplated by the Court's order of May 31, 1927.

The Power Authority has constructed, in conjunction with The Hydro-Electric Power Commission of Ontario, a combined hydroelectric works in the International Rapids section of the St. Lawrence River. These works were authorized, pursuant to the United States-Canadian Boundary Waters Treaty of 1909 between the United States and Great Britain (36 Stat. (Part 2) 2448) by the International Joint Commission (Order of Approval of Power Works, October 29, 1952, a copy of which is annexed as Exhibit A to the supplemental and amended complaint), which authorized such works to be constructed by The Hydro-Electric Power Commission of Ontario and a designee of the United States. Authorization for the construction of

the United States portion of such works, pursuant to the Federal Power Act, was given to the Power Authority by the Federal Power Commission's grant of a license for hydroelectric Project No. 2000 on July 15, 1953 (12 FPC 172). On November 4, 1953 the Power Authority was declared the designee of the United States for the construction of the works referred to in the Order of Approval by the President of the United States in Executive Order No. 10500, a copy of which is annexed as Exhibit B to the supplemental and amended complaint. The combined works have been constructed at a total cost of approximately $665,000,000 and the Power Authority has financed its portion of said works through the sale of approximately $350,000,000 of its revenue bonds. The Power Authority receives one half of the total flow of water at the combined works, which works are physically capable of using the entire natural flow of the St. Lawrence (including the amount now diverted by the defendants), and in addition thereto a flow arising from a diversion by Canada into the Great Lakes watershed which has been authorized by international agreement. Therefore, any increase or decrease of the present diversion by the defendants and their agents directly affects the amount of power and energy available to the Power Authority and to the State of New York, its agencies and its citizens.

By the Niagara River Water Diversion Treaty of 1950 (1 U.S.T. 695), a formula is set up to apportion the total outflow from Lake Erie, which outflow passes through the Welland Canal and the Niagara River. Under this formula, the use of the above mentioned diversion by Canada into the Great Lakes watershed is reserved to Canada. The remainder of the outflow from Lake Erie, after deducting from such outflow the amount of water used and necessary for domestic and sanitary purposes, and for the

service of canals for the purposes of navigation, is made available for scenic and power purposes. (It is complainant's contention that the diversion by defendants and their agents is not a proper deduction under the terms of said Treaty, both because the Treaty deducts only necessary diversions and the defendants' diversion is not necessary; and because the Treaty deducts only diversions from the outflow of Lake Erie, whereas the defendants' diversion is from Lake Michigan.) Of the remainder after the aforementioned deductions, certain specified quantities of water are reserved for the preservation of the scenic beauty of Niagara Falls; all of the rest is made available for power purposes and divided equally between the United States and Canada. By Public Law 85-159 (71 Stat. 401, 16 U.S.C. Section 836), the Federal Power Commission was authorized and directed to issue a license to the Power Authority for the construction of works to utilize all of the United States' share of the water of the Niagara River permitted to be used by international agreement. Subsequently, on January 30, 1958 the Power Authority obtained from the Federal Power Commission a license for the construction of works comprising hydroelectric Project 2216 on the Niagara River (19 F.P.C. 186, superseding 18 F.P.C. 344). Said works are now being constructed by the Power Authority, and approximately $185,000,000 have been expended on its construction as of July 31, 1959. The works will be completed in 1963 at a total estimated cost of $720,000,000. The works will first produce power in February, 1961, and will produce power at full capacity by December, 1962. Such works are capable of utilizing the entire flow available to the United States for power purposes, that is to say, one half of the remainder after deducting from the natural flow (including in said natural flow the flow presently diverted

at Chicago), the amounts reserved by the Treaty for scenic purposes. Any increase or decrease of the diversion from Lake Michigan by defendants or their agents, which diversion is presently believed to be in the amount of approximately 3,300 cfs, therefore will directly affect the amount of power which can be produced by said works and will directly affect the amount of power and energy available to the State of New York, its agencies and its citizens.

While the aforementioned hydroelectric works present the chief need for a revised complaint herein, other changes have occurred in the thirty-three years which have elapsed since the filing of the original complaint, which make it desirable that a supplemental and amended complaint be substituted in this action.

The most important single intervening event other than the St. Lawrence and Niagara Power projects, is the St. Lawrence Seaway Project, which as mentioned above was completed during the year 1959. This project was built jointly by the Saint Lawrence Seaway Development Corporation, a corporation created by the Congress, and by the St. Lawrence Seaway Authority, a corporation created under the Laws of Canada, and was constructed at a combined cost of approximately $650,000,000. The locks have been designed to and do enable ocean going vessels of 27 foot draft to enter the Great Lakes system, whereas previously vessels of only 14 feet draft could navigate between the Great Lakes and the Atlantic Ocean. The fact that vessels of greater draft are now entering the Great Lakes waterway has changed the nature as well as the extent of Great Lakes commerce and makes it imperative that New York's Great Lake ports have harbor facilities capable of accommodating these deep-draft ocean-going vessels. To the extent the present diversion by defendants and their agents, particularly the city of Chicago which is an agency

of the defendant State of Illinois, or any increase thereof in the guise of domestic pumpage for water supply or flushage of sewage to the Mississippi watershed, makes construction, installation and maintenance of such harbor installations more expensive or impossible by virtue of reducing the level of the Great Lakes below what they would otherwise be, New York is suffering damages of a nature and extent not demonstrable at the time of the 1930 decree.

Aside from the above mentioned hydroelectric and navigational projects, there has been in the last three decades a continuing expansion in the use of the waters of the Great Lakes watershed for recreational, municipal, and industrial purposes by the citizens and agencies of New York, all of which uses are damaged by the diversion from Lake Michigan by Illinois. Accordingly, it is now desirable to set forth such elements of damage more fully than was done in the 1926 complaint.

In addition, many of the allegations of the original complaint are now obsolete and relate to issues now moot by virtue of the 1930 decree. In light of these changed facts and circumstances, it is submitted that it is appropriate that a supplemental and amended complaint be served and

referred to the Special Master in place of the original 1926 complaint.

Respectfully submitted,

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October 21, 1959

IN THE

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STATE OF NEW YORK,
Complainant,
against
STATE OF ILLINOIS AND SANITARY DISTRICT OF CHICAGO,
Defendants.

October Term, 1959
No. 4 Original

SUPPLEMENTAL AND AMENDED COMPLAINT

Complainant State of New York, by its Attorney General, Louis J. Lefkowitz, for its supplemental and amended complaint herein, alleges as follows:

1. The jurisdiction of this Court is invoked under Article III, Section 2, of the Constitution of the United States. The State of New York is one of the sovereign states of the United States of America, and the defendant, State of Illinois, is also one of the sovereign states of the United States of America. The defendant, Metropolitan Sanitary District of Chicago (formerly named Sanitary District of Chicago, and hereinafter referred to as the "Sanitary District"), is a public corporation organized and existing under and by virtue of the Laws of the State of Illinois, and is a citizen and agency of said State.

2. In the year 1889 the legislature of the State of Illinois enacted a statute entitled "An act to create sanitary districts, and to remove obstructions in the Des Plaines and Illinois Rivers," approved May 29, 1889, and published in the laws of Illinois for the year 1889 com-

mencing at page 126; which act authorized the organization of public corporations to be known as sanitary districts, with power, among other things, to construct, maintain and operate drainage canals or channels for the disposal of drainage and sewage. By sections 23 and 24 of the said act, it was further provided as follows, to wit:

> "§23. If any channel is constructed under the provisions hereof by means of which any of the waters of Lake Michigan shall be caused to pass into the Des Plaines or Illinois rivers, such channel shall be constructed of sufficient size and capacity to produce and maintain at all times a continuous flow of not less than 300,000 cubic feet of water per minute, and to be of a depth of not less than fourteen feet, and a current not exceeding three miles per hour, and if any portion of any such channel shall be cut through a territory with a rocky stratum where such rocky stratum is above a grade sufficient to produce a depth of water from Lake Michigan of not less than eighteen feet, such portion of said channel shall have double the flowing capacity above provided for, and a width of not less than one hundred and sixty feet at the bottom capable of producing a depth of not less than eighteen feet of water. If the population of the district drained into such channel shall at any time exceed 1,500,000, such channel shall be made and kept of such size and in such condition that it will produce and maintain at all times a continuous flow of not less than 20,000 cubic feet of water per minute for each 100,000 of the population of such district, at a current of not more than three miles per hour, and if at any time the general government shall improve the Des Plaines or Illinois rivers, so that the same shall be capable of receiving a flow of 600,000 cubic feet of water per minute, or more, from said channel, and shall provide for the payment of all damages which any extra flow above 300,000 cubic feet of water per

minute from such channel may cause to private property so as to save harmless the said district from all liability therefrom, then such sanitary district shall within one year thereafter, enlarge the entire channel leading into said Des Plaines and Illinois rivers from said district to a sufficient size and capacity to produce and maintain a continuous flow throughout the same of not less than 600,000 cubic feet of water per minute with a current of not more than three miles per hour, and such channel shall be constructed upon such grade as to be capable of producing a depth of water not less than eighteen feet throughout said channel, and shall have a width of not less than one hundred and sixty feet at the bottom. In case a channel is constructed in the Des Plaines river as contemplated in this section it shall be carried down the slope between Lockport and Joliet to the pool commonly known as the upper basin, of sufficient width and depth to carry off the water the channel shall bring down from above. The district constructing a channel to carry water from Lake Michigan of any amount authorized by this act may correct, modify and remove obstructions in the Des Plaines and Illinois rivers wherever it shall be necessary so to do to prevent overflow or damage along said river, and shall remove the dams at Henry and Copperas Creek in the Illinois river, before any water shall be turned into the said channel.

" * * *

"§24. When such channel shall be completed, and the water turned therein, to the amount of three hundred thousand cubic feet of water per minute, the same is hereby declared a navigable stream, and whenever the general government shall improve the Des Plaines and Illinois rivers, for navigation, to connect with this channel, said general government shall have full control over the same for navigation purposes, but not to interfere with its control for sanitary or drainage purposes."

3. In November and December of the year 1889, the Sanitary District was organized as a sanitary district under the act of 1889 hereinbefore referred to, and has since continuously existed as such sanitary district under the said act of 1889 and the acts amendatory thereof and supplementary thereto. At the time of its organization said defendant district consisted of a territory about 185 square miles in area. By successive acts of the legislature of Illinois the area of the Sanitary District has been increased from time to time, and its area is now approximately 869 square miles, and comprises the entire city of Chicago together with large areas of land to the south, west and north of said city.

4. On or about the 3rd day of September, 1892, defendant Sanitary District, acting as a subordinate agency of the defendant, State of Illinois, pursuant to the act of 1889 hereinbefore referred to, commenced the construction of a canal or channel (hereinafter called the "Sanitary Canal") commencing at a point in the west fork of the south branch of the Chicago river about 6 miles above the mouth of said river, which river was a navigable stream tributary to and a part of the Great Lakes watershed, and extending in a general westerly direction for a distance of about 32 miles to a point near the city of Joliet, Illinois. At its westerly terminus said Canal was made to connect with the Des Plaines river, a stream flowing in a westerly and southwesterly direction and forming a tributary of the Illinois river, which latter river in turn flows in a westerly and southwesterly direction and forms a tributary of the Mississippi river.

5. In the construction of the Sanitary Canal it was at all times the plan of the defendant, State of Illinois, and the defendant Sanitary District that the said Canal should

be used as a passage-way for the sewage of the territory comprising the Sanitary District to the end that such sewage might be carried down the said Canal into the Des Plaines and Illinois rivers; and in order to accomplish the said purpose it was the intention of said defendants at and prior to the commencement of the construction of said Sanitary Canal to divert from Lake Michigan, and pass through the said Canal, such amounts of water as might be deemed by said defendants to be necessary for the proper dilution of the said sewage and its propulsion through the Canal and the Des Plaines and Illinois rivers. In pursuance of such intention, and prior to the completion of said Canal, the legislature of the defendant State of Illinois enacted in the year 1895 an amendment to section 20 of the act of 1889 hereinbefore referred to, which amendment is published in the Laws of Illinois for the year 1895 commencing at page 168 thereof, and provides that any sanitary district organized under the provisions of the act of 1889 and maintaining a channel which causes the discharge of sewage into or through any river beyond the limits of such district, "shall, at the time any sewage is turned into or through any such channel or channels, turn into such channel or channels not less than 20,000 cubic feet of water per minute for every 100,000 inhabitants of said district, and shall thereafter maintain the flow of such quantity of water."

6. Upon the completion of the Sanitary Canal, the defendant, Sanitary District, in compliance with section 27 of the said act of 1889, applied to the Governor of the State of Illinois for authority to commence the use of said Canal, and such authority was granted by the said governor on behalf of the defendant State of Illinois, and thereupon, on or about the second day of January,

1900, said defendant Sanitary District commenced the abstraction of water from Lake Michigan and its diversion into the Chicago river and thence into and through the said Canal, in such amounts and at such velocity as to reverse the flow of the Chicago river and create a steady and uninterrupted flow of water, from said day down to the present time, from Lake Michigan through the Chicago river to the said Canal thence through the said Canal to the Des Plaines river near Joliet, and thence down the Des Plaines and Illinois rivers to the Mississippi river.

7. The primary object and purpose of the act of 1889 hereinbefore referred to, as said act was construed by the highest court of the State of Illinois in the cases of *People* v. *Nelson,* 133 Ill. 565, 27 N.E. 217 (1890) and *Beidler* v. *Sanitary District of Chicago,* 211 Ill. 628, 71 N.E. 1118 (1904), was to provide a method of disposing of the sewage of the city of Chicago and contiguous territory, and the Sanitary Canal constructed by the defendant Sanitary District as hereinbefore described has been continuously used for such purpose since the month of January, 1900.

8. Subsequent to the opening of the said Sanitary Canal, and in the year 1903, the defendant, State of Illinois, by an act of its legislature approved May 14, 1903, and published in the Laws of Illinois for the year 1903 commencing on page 113 undertook to authorize the defendant Sanitary District to construct and operate a plant for the generation of electrical energy by hydraulic power derived from the water passing from Lake Michigan through the said Canal. The provision of said act with reference to said subject are as follows:

> "§5. That the said sanitary district of Chicago is hereby authorized to construct all such dams,

waterwheels and other works north of the upper basin of the Illinois and Michigan Canal as may be necessary or appropriate to develop and render available the power arising from the water passing through its main channel and any auxiliary channels now, or hereafter, constructed by said district.

"§6. That the power made available by the works constructed under the provisions of this act shall be converted into electrical energy, and shall be transmitted to the various cities, villages and towns within said sanitary district, or adjacent to the main channel of said sanitary district, and may be used in the lighting of said cities, villages and towns, or parts thereof, or for the operation of pumping plants or machinery used for municipal purposes or for public service, or may be disposed of to any other person or corporation, upon such terms and conditions as may be agreed to by the said sanitary district: Provided, however, that it shall be the duty of said sanitary district to utilize so much of said power as may be required for that purpose to operate the pumping stations, bridges and other machinery of said sanitary district."

9. Under and by virtue of the authority attempted to be conferred on the defendant Sanitary District by the defendant State of Illinois in said act of 1903, said Sanitary District constructed and placed in operation a hydro-electric power plant at Lockport near the western terminus of the said Canal, and has continuously operated the same since its completion in the month of November, 1907. Upon information and belief, the operations of said plant since the year 1907 have produced many millions of dollars of gross revenue to the defendant Sanitary District and have earned for the said Sanitary District many millions of dollars of profits over and above the cost of operating the said plant, including proper allowances for depreciation and a reasonable return upon investment therein.

10. Since the completion of said hydroelectric development near the western terminus of said Sanitary Canal, the object and purpose of the defendants in the operation of the said Canal and in the abstraction of water from Lake Michigan through the same has been and is now two-fold, to-wit: the disposition of the sewage of the defendant Sanitary District, and the generation and sale of electrical energy.

11. Upon complaint by the State of New York and other States bordering upon the Great Lakes, and after hearings duly held before Honorable Charles Evans Hughes, Special Master, this Court determined in *Wisconsin* v. *Illinois*, 278 U. S. 367 (October Term 1928), that the diversion of water from the Great Lakes watershed by defendants State of Illinois and the Sanitary District, or their agents except to the extent necessary to preserve navigation in the Chicago River, was "without any legal basis", and "in violation of the complainants' rights", and that the complainants "are entitled to a decree which will be effective in bringing that violation and the unwarranted part of the diversion to an end". However, "in keeping with the principles on which courts of equity condition their relief, and by way of avoiding any unnecessary hazard to the health of the people of that section" which would have resulted if such unlawful diversion had been immediately enjoined because of the then lack of adequate sewage disposal facilities, the matter was referred back to the Special Master to determine necessary steps requiring the Sanitary District "to construct and put in operation with all reasonable expedition adequate plants for the disposition of the sewage through other means than the lake diversion", the Court stating however that "Though the restoration of

just rights to the complainants will be gradual instead of immediate it must be continuous and as speedy as practicable, and must include everything that is essential to an effective project."

12. In its decision following the report of Special Master Hughes on rereference (*Wisconsin* v. *Illinois*, 281 U. S. 179 (October Term, 1929)), this Court held that with "regard to relative suffering" and in view of the limited efficiency of the sanitary treatments then available, the decree should require the defendants and their agents to limit their diversion to an annual average of 1,500 cubic feet of water per second (hereinafter, "cfs") in addition to domestic pumpage. The decision noted, however, that whether the right for domestic use extends to industrial plants "may be open to consideration at some future time". The decision also required that the decree should provide

> "That any of the parties hereto, complainants or defendants, may * * * apply at the foot of this decree for any other or further action or relief, and this Court retains jurisdiction of the above-entitled suits for the purpose of any order or direction, or modification of this decree, or any supplemental decree, which it may deem at any time to be proper in relation to the subject matter in controversy." (p. 202.)

On April 21, 1930 this Court entered a decree (281 U. S. 696) in accordance with the above-mentioned decision.

13. Upon information and belief, the defendants and their agents, particularly the City of Chicago, currently divert as aforesaid into the Sanitary Canal and out of the Great Lakes watershed, 1500 cfs plus combined domestic and industrial pumpage averaging approximately 1800 cfs, which domestic and industrial pumpage

is expected to increase rapidly in the immediate future due to expansion of population and industry in Chicago. The present diversion has been determined to be in violation of the sovereign and proprietary rights of the State of New York. The equitable considerations of relative hardship which precluded this Court from requiring an immediate and complete termination of such diversion in 1929 and 1930 are no longer applicable, in that the damage to complainant State of New York, its agencies and its citizens, and the other complainant States, and to Canada, from the present diversion is now greatly in excess of and disproportionate to the expense or inconvenience to which the defendants might be put by a termination of such diversion, all as more fully set forth below. Further, such equitable considerations were not, either in 1929 or in 1930 or at present, applicable to diversion of water from the watershed for the use of industrial plants, but rather such diversion for industrial purposes, without return of the effluent, provides a cheap means of industrial sewage disposal which defendants offer as an inducement, in competition with this complainant and others to attract industry to the area served by the Sanitary District, and defendants thereby seek to increase said industrial diversion in violation of this complainant's rights and at this complainant's expense.

14. Under present conditions, said diversion of 1800 cfs of domestic and industrial pumpage out of the Great Lakes watershed is unnecessary and wasteful of the waters of the Great Lakes. No more than 1500 cfs is required to be diverted in order to maintain navigation, even if such diversion from the Great Lakes watershed for navigational purposes would be proper. The domestic and industrial

pumpage of 1800 cfs could be materially reduced if the defendant, State of Illinois, and its agencies took proper steps to reduce unnecessary waste of water by its citizens, residents and industries by metering said water and by other means. Further, the effluent from such pumpage as is necessary, can under existing available sanitary methods, be safely treated and returned to the Great Lakes watershed; or, alternatively, such available modern methods of sewage treatment could purify the effluent to a degree where all or part of such effluent may be used to support navigation in the Sanitary Canal and the present diversion of 1500 cfs from Lake Michigan for navigational purposes could be thereby discontinued.

15. Lake Michigan is one of the Great Lakes, and part of a single common, great natural waterway consisting of Lake Superior, Lake Michigan, Lake Huron, Lake Erie, Lake Ontario, and the Niagara and St. Lawrence Rivers, together with certain connecting straits, rivers, harbors, channels and canals. Any diversion of water from Lake Michigan, if said water is not subsequently returned to the Great Lakes-St. Lawrence system, results in a lowering of the level of each of said Lakes, the Niagara and St. Lawrence Rivers, and the aforesaid connecting straits, rivers, harbors, channels and canals.

16. The State of New York has approximately 775 miles of shoreline on Lakes Erie and Ontario, the Niagara River, and on that part of the St. Lawrence River forming the international boundary between the State of New York and Canada. The State of New York owns all of the beds of those lakes and rivers lying within its boundaries, subject only to the right of the public to navigate the same, and subject to the power of Congress to regulate interstate and international commerce thereon.

17. The State of New York, its agencies and its citizens have a right in and to the Great Lakes-St. Lawrence Waterway as a highway of commerce concurrent with the rights of the other states of the United States bordering upon said waterway, subject to the aforesaid power of the Congress and to the concurrent rights of Canada under international law and treaty, and are lawfully entitled to receive all of the waters from rivers and streams in the Great Lakes watershed without diminution by any other State, its agencies or its citizens for the purpose of keeping up and maintaining the waters in the Great Lakes-St. Lawrence Waterway.

18. In reliance upon said right to the undiminished waters of said watershed, the State of New York, its agencies, its municipalities, and its citizens have expended great sums of money in making improvements in aid of navigation (obtaining appropriate permits from the United States where necessary) including the construction of docks, wharves, and slips, and the dredging of ports and harbors. In addition, the State of New York has built and has maintained a system of barge canals connecting said waterway, at Lakes Erie and Ontario and at the St. Lawrence River (via Lake Champlain and the Richelieu River), with the Hudson River and thereby with an outlet to the Atlantic Ocean at New York City, which has provided an avenue of intrastate, interstate, and international commerce.

19. During the year 1959 there was completed the St. Lawrence Seaway Project, built jointly by the Saint Lawrence Seaway Development Corporation, a corporation created by the Congress, and the St. Lawrence Seaway Authority, a corporation created under the laws of Canada. This joint international navigational project has,

for the first time, enabled ocean going vessels of 27 foot draft to enter the Great Lakes system, and in reliance upon and in aid of said navigational project substantial expenditures have been undertaken and planned by the State of New York, its agencies, its municipalities and its citizens for navigational improvements to accommodate such vessels.

20. There exist along the shores of the Great Lakes and elsewhere in the Great Lakes watershed, or adjacent thereto, numerous large and populous municipalities in the United States and in Canada. If Illinois and the Sanitary District is permitted to divert and abstract water from the Great Lakes watershed, such other municipalities and Canada would be in a position to claim a like right of diversion. In that event, the withdrawal of water from the Great Lakes watershed for sanitary, domestic and industrial purposes, without returning it to said Great Lakes system after usage and treatment, would result in the aggregate diversion of an even larger quantity of water than is now being diverted by the Sanitary District.

21. Any withdrawal of waters from the Great Lakes results in proportionate reductions in the levels of Lake Erie and Lake Ontario, and the St. Lawrence and Niagara Rivers, as well as in the rest of the Great Lakes—St. Lawrence Waterway with the exception of Lake Superior, with the consequent reduction of navigability of the Waterway and the New York Barge Canal, a loss of commerce to the State of New York, its agencies, its municipalities and its citizens, and a loss in value of the navigational aids and facilities which have been constructed by the State of New York, its agencies, its municipalities and its citizens. Such diversion, consequently, results in injury

to the State of New York in its sovereign capacity as *parens patriae* of the rights of its agencies, its municipalities and citizens, and in its proprietary capacity as owner of substantial portions of its shore line on the Great Lakes system, and of said navigational aids and facilities.

22. The right to use the natural flow of the Great Lakes water system for the production of hydroelectric power is a property right of the State of New York, its agencies, its municipalities and of its citizens, subject to reasonable regulation by Congress but only insofar as it may affect interstate or international commerce. Such regulation has been exercised by Congress through the Federal Power Act (41 Stat. 1063, 16 U.S.C. §791a et seq.) as amended, and Public Law 85-159 (71 Stat. 401, 16 U.S.C. §836). Such right of the State of New York, its agencies, its municipalities, and its citizens is also subject to the concurrent right of Canada under international law and treaty.

23. The State of New York has declared that those parts of the Niagara and St. Lawrence Rivers within its boundaries are natural resources of the State for the use and development of commerce and navigation in the interest of the people of the State and of the United States, and, in order to provide for the most beneficial use of said natural resources and for the creation and development of hydroelectric power in the interest of the people of the State, has declared such natural resources to be inalienable (New York Public Authorities Law §1001).

24. Pursuant to said declaration, the State of New York has created the Power Authority of the State of New York (hereinafter, the "Power Authority") as a

corporate municipal instrumentality of the State of New York and a political subdivision of the State exercising governmental and public powers (New York Public Authorities Law §1002), to develop the hydroelectric resources of the State of New York existing in the Niagara and St. Lawrence Rivers.

25. In compliance with the provisions of the Federal Power Act, the Power Authority has obtained, from the Federal Power Commission, a license for the construction of a hydroelectric Project No. 2000 on the St. Lawrence River. Said Project No. 2000 has been constructed as one part of a combined hydroelectric project in cooperation with The Hydro-Electric Power Commission of Ontario. Such combined hydroelectric project was authorized, pursuant to the United States-Canadian Boundary Waters Treaty of 1909 between the United States and Great Britain (36 Stat. (Part 2) 2448) by the International Joint Commission (Order of Approval of Power Works, October 29, 1952, a copy of which is annexed hereto as Exhibit A). By Executive Order No. 10500 dated November 4, 1953 (a copy of which is annexed hereto as Exhibit B), the President of the United States declared the Power Authority the designee of the United States for the construction of the works referred to in said Order of Approval. The combined project has been constructed by the Power Authority and The Hydro-Electric Power Commission of Ontario at a total cost of approximately $665,000,000. Over $363,000,000 of such sum, including over $203,000,000 expended by the Power Authority, was expended upon the construction of facilities which were necessary for and in aid of, the aforementioned St. Lawrence Seaway Project, such expenditure having been required by the aforementioned International Joint Commission Order of Approval and by the Federal Power Commission license.

The Power Authority has financed its portion of the project through the sale of approximately $350,000,000 of its revenue bonds, including the sale of such bonds to citizens of the State of New York and others. Such bonds do not pledge the credit either of the State of New York or of the United States. The Power Authority is presently entitled to receive one-half of the total flow of water at the combined hydroelectric project.

26. The combined hydroelectric project has been constructed to utilize and can utilize the entire natural flow of the St. Lawrence River (including that flow presently being diverted by defendants), together with such additional flow as has heretofore been made available by international agreement, for conversion into hydroelectric power and energy. The Power Authority has contracted for the sale of all of its share of the entire output of hydroelectric power and energy from the combined hydroelectric project, to the United States, to municipalities and to corporations within the State of New York and to an agency of the State of Vermont. The terms of these contracts make provision for the sale of all hydroelectric power and energy to which the Power Authority would be entitled if there were available at the combined hydroelectric project, for conversion into such hydroelectric power and energy, the said entire natural flow (including that flow presently diverted by defendants), together with the additional flow which has heretofore been made available by international agreement.

27. Diversion of 1,000 cfs from Lake Michigan ultimately results in a loss of 1,000 cfs at the St. Lawrence plant. If such diversion of 1,000 cfs is of such nature that it is required to be deducted entirely from the flow otherwise available to the United States designee (the Power

Authority), such diversion results in a loss of 53,000,000 KWH of energy per year and 7,200 KW of capacity, resulting in an annual loss of revenue of $229,000 at the rates at which the Power Authority is now selling power.

28. In compliance with the provisions of the Federal Power Act and of the Public Law 85-159 (71 Stat. 401, 16 U.S.C. §836), and the Niagara River Water Diversion Treaty of 1950 (1 U.S.T. 694), the Power Authority has obtained, from the Federal Power Commission, a license for the construction of hydroelectric Project No. 2216 on the Niagara River. Said Project No. 2216 is now being constructed by the Power Authority, and approximately $185,000,000 have been expended on its construction as of July 31, 1959. It will be completed in 1963, at a total estimated cost of $720,000,000, which is being financed through the sale of Power Authority revenue bonds, including the sale of such bonds to citizens of the State of New York and others, of which $400,000,000 of such bonds have already been sold. Such bonds do not pledge the credit of the State of New York or of the United States. The works will produce first power in February, 1961, and will produce power at full capacity in December, 1962.

29. Said Project No. 2216 is being constructed to utilize the entire United States share of the natural flow of the Niagara River (including amounts now diverted by defendants), available for power purposes under the Niagara River Water Diversion Treaty of 1950. Public Law 85-159 requires the Power Authority to make a reasonable portion of the project power, subject to a specified limitation, available for use within reasonable economic transmission distance in neighboring States; the remainder will be sold to municipalities and citizens of the State of New York.

30. Diversion of 1,000 cfs of water from Lake Michigan ultimately results in a loss of 1,000 cfs from the Niagara River. If such diversion of 1,000 cfs is of such nature that it is required to be deducted entirely from the flow otherwise available to the United States, such diversion results in a loss of 198,000,000 KWH of energy per year and 32,300 KW of capacity, resulting in an annual loss of revenue of $916,000 at the rates at which the Power Authority is now selling power.

31. If the unnecessary diversion by the defendants and their agents is allowed to continue it may become a precedent for similar diversions by numerous municipalities in the United States and Canada along and adjacent to the Great Lakes. Such diversions in the aggregate could amount to even larger flows of water than are now being diverted by the defendants and their agents. Each 1,000 cfs so diverted, if under international law and treaty the resultant loss of flow at the St. Lawrence and Niagara Falls plants is required to be deducted from the flow available to the United States, would cause an annual loss to the Power Authority at the said plants of 251,000,000 KWH, 39,500 KW and $1,145,000.

32. All hydroelectric power and energy produced by the Power Authority is sold by it in such manner that the consumers pay only cost plus an amount sufficient to amortize the facilities over a reasonable period, and after such facilities have been fully amortized all power and energy will be sold by it in such manner that the consumers will pay only cost of production. Any loss of hydroelectric capacity and energy which could be produced by the two Projects Nos. 2000 and 2216 must be replaced with steam-generated capacity and with energy produced by steam-generating sources, at increased cost to the

domestic, rural, commercial and industrial consumers. The cost of replacing the hydroelectric power and energy lost to the Power Authority from each 1,000 cfs of flow lost to the Power Authority is estimated at $1,757,000 per year. The increased cost of steam-produced power and energy is prejudicial to the expansion, economic operation, or the continuation of numerous commercial and industrial establishments within the State of New York, and is thus prejudicial in the employment of the citizens of the State of New York and to the tax revenues of the State of New York, its agencies and its municipalities.

33. The right to use the flow of the Great Lakes system, without diminution by any other State, for recreational purposes is a sovereign and proprietary right of the State of New York, its agencies, its municipalities, and its citizens, subject to reasonable regulation by Congress insofar as it may affect interstate or international commerce and to the concurrent rights of Canada under international law and treaty. The State of New York, its agencies, its municipalities, its citizens, subject to said aforesaid power of Congress, are lawfully entitled to receive all of the waters from rivers and streams in the Great Lakes watershed provided by nature, for the purpose of keeping up and maintaining the level of the waters in the Great Lakes-St. Lawrence Waterway for recreational purposes.

34. In reliance upon said right to the undiminished waters of said watershed, the State of New York, its agencies, its municipalities and its citizens, including the Power Authority, have expended and are expending great sums in making recreational improvements along the shores and on the islands of Lakes Erie and Ontario, and the St. Lawrence and Niagara Rivers, including State

and municipal parks, beaches and marinas, and in addition thereto, numerous private beaches, bathing docks, marinas and docks, slips, and wharves for recreational boating and fishing.

35. Any diversion of waters from the Great Lakes watershed results in some degree in a lowering of the levels of Lakes Erie and Ontario, and of the Niagara and St. Lawrence Rivers, with consequential changes in the contours of the shore lines at the sites of the aforementioned State, municipal, and private recreational improvements, and changes in the depths of the bottoms at the sites of such recreational improvements. There is therefore a consequent reduction in the usefulness and value for recreational purposes of the shorefront property and recreational improvements. Said reduction of the usefulness and value for recreational purposes of such shorefront property and recreational improvements damages the State of New York both in its proprietary capacity as owner of much of said shorefront property and recreational improvements, and in its sovereign capacity as representative or *parens patriae* of its agencies, its municipalities and its citizens.

36. The State of New York and its citizens have a right in and to the waters of Lakes Erie and Ontario, and the Niagara and St. Lawrence Rivers for domestic, municipal, and industrial purposes, subject to the aforesaid power of Congress, and subject to the concurrent rights of Canada under international law and treaty and are lawfully entitled to receive all of the waters which would flow into said lakes and rivers from the other rivers and streams in the Great Lakes Waterway without diminution by any other State, its agencies or its citizens.

37. In reliance upon said right to the undiminished waters of said Waterway, the State of New York, its agencies, its municipalities and its citizens have expended sums of money in providing means for utilizing said waters for domestic, municipal and industrial purposes with, however, said waters being returned to the Great Lakes-St. Lawrence watershed after such uses.

38. Any diversion of waters from the Great Lakes watershed lowers the level of Lakes Erie and Ontario and the St. Lawrence and Niagara Rivers, and the present substantial diversion requires and will require extensive and expensive additional works in order to attempt to maintain an adequate supply of water to the citizens of the State of New York.

39. The present permanent diversion of water from Lake Michigan by the defendants and their agents violates international law, the United States-Canadian Boundary Waters Treaty of 1909 between the United States and Great Britain (36 Stat. (Part 2) 2448) and the Niagara River Water Diversion Treaty of 1950 (1 U. S. T. 694).

WHEREFORE, complainant State of New York demands that judgment be entered herein enjoining any diversion of waters from the Great Lakes watershed by the defendants or their agents or instrumentalities for domestic or industrial purposes, unless the effluent, after proper purification, be returned thereto or such effluent be utilized in whole or in part for navigation purposes in lieu of all or part of the 1500 cfs presently being diverted for such purposes; or, if this Court should determine that such diversion not be absolutely enjoined, then determining the extent of the injury to this complainant, its agencies, its municipalities and its citizens resulting from such diver-

sion, in so far as said injury can be measured in monetary terms, and enjoining such diversion unless the defendants or their instrumentalities compensate this complainant, its instrumentalities and its citizens for said injury; and such other, further and different relief as may be just, equitable and proper; and that costs be assessed against the defendants.

Respectfully submitted,

LOUIS J. LEFKOWITZ,
Attorney General of the State of New York,

PAXTON BLAIR,
Solicitor General of the State of New York,

RICHARD H. SHEPP,
Assistant Attorney General of the State of New York,

RANDALL J. LE BOEUF, JR.,
Special Assistant Attorney General of the State of New York.

October 21, 1959

EXHIBIT A

DOCKET 68

INTERNATIONAL JOINT COMMISSION

IN THE MATTER OF THE APPLICATIONS OF THE GOVERNMENT OF CANADA AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA FOR AN ORDER OF APPROVAL OF THE CONSTRUCTION OF CERTAIN WORKS FOR DEVELOPMENT OF POWER IN THE INTERNATIONAL RAPIDS SECTION OF THE ST. LAWRENCE RIVER

ORDER OF APPROVAL

WHEREAS the Government of Canada and the Government of the United States of America under date of 30 June, 1952, have submitted Applications to the International Joint Commission (hereinafter referred to as the "Commission") for its approval of the construction, jointly by entities to be designated by the respective Governments, of certain works for the development of power in the International Rapids Section of the St. Lawrence River, these being boundary waters within the meaning of the Preliminary Article of the Boundary Waters Treaty of 11 January, 1909 (hereinafter referred to as the "Treaty"), and of the construction, maintenance and operation of such works subject to and under conditions specified in the Applications, and have requested that the Applications be considered by the Commission as in the nature of a joint application; and

WHEREAS pursuant to the aforementioned request of the two Governments, the Commission is considering the two applications as in the nature of a joint application; and

WHEREAS notices that the applications had been filed were published in accordance with the Rules of Procedure of the Commission; and

WHEREAS Statements in Response to the Applications and Statements in Reply thereto by both Applicants were filed in accordance with the Rules of the Commission; and

WHEREAS pursuant to published notices, hearings were held by the Commission at Toronto, Ontario, on 23 July, 1952; at Ogdensburg, New York, on 24 July, 1952; at Cornwall, Ontario, on 25 July, 1952; at Albany, New York, on 3 September, 1952; at Montreal, Quebec, on 8 September, 1952; and at Washington, D. C., on 20 October, 1952; and

WHEREAS by reason of the said notices of the said applications and hearings, all persons interested were afforded convenient opportunities of presenting evidence to and being heard before the Commission; and

WHEREAS, pursuant to the said Applications, the hearings before, the evidence given, and material filed with the Commission, the Commission is satisfied that the proposed works and uses of the waters of the International Rapids Section comply with the principles by which the Commission is governed as adopted by the High Contracting Parties in Article VIII of the Treaty; and

WHEREAS the Commission has been informed that the Government of Canada has designated The Hydro-Electric Power Commission of Ontario as the entity to construct, maintain and operate the proposed works in Canada, and that the Government of the United States intends in due course to designate the entity to construct, maintain and operate the works in the United States; and

WHEREAS the program of construction of the works, as proposed by the Applicants, includes the removal of Gut Dam from the International Rapids Section and the Government of Canada has informed the Commission that it is its intention to take steps for the early removal of Gut Dam as soon as the construction of the proposed works is approved and as soon as river conditions and the protection of down river and other interests that will be affected during its removal will permit, thereby advancing the time of removal of Gut Dam; and

WHEREAS the Commission finds that suitable and adequate provision is made by the laws in Canada and by the Constitution and laws in the United States for the protection and indemnity of all interests on either side of the International Boundary which may be injured by reason of the construction, maintenance and operation of the works; and

WHEREAS the Commission finds that it has jurisdiction to hear and dispose of the Applications by approval thereof in the manner and subject to the conditions hereinafter set out;

NOW, THEREFORE, IT IS ORDERED that the construction, maintenance and operation jointly by the Hydro-Electric Power Commission of Ontario and an entity to be designated by the Government of the United States of America of certain works (hereinafter called "the works") in accordance with the "Controlled Single Stage Project (238-242)", which was part of the joint report dated 3 January, 1941, of the Canadian Temporary Great Lakes-St. Lawrence Basin Committee and the United States St. Lawrence Advisory Committee, containing the features described in Appendix "A" to this Order and shown in

Appendix "B" to this Order, be and the same are hereby approved subject to the conditions enumerated below, namely,

(a) All interests on either side of the International Boundary which are injured by reason of the construction, maintenance and operation of the works shall be given suitable and adequate protection and indemnity in accordance with the laws in Canada or the Constitution and laws in the United States respectively, and in accordance with the requirements of Article VIII of the Treaty.

(b) The works shall be so planned, located, constructed, maintained and operated as not to conflict with or restrain uses of the waters of the St. Lawrence River for purposes given preference over uses of water for power purposes by the Treaty, namely, uses for domestic and sanitary purposes and uses for navigation, including the service of canals for the purposes of navigation, and shall be so planned, located, constructed, maintained and operated as to give effect to the provisions of this Order.

(c) The works shall be constructed, maintained and operated in such manner as to safeguard the rights and lawful interests of others engaged or to be engaged in the development of power in the St. Lawrence River below the International Rapids Section.

(d) The works shall be so designed, constructed, maintained and operated as to safeguard so far as possible the rights of all interests affected by the levels of the St. Lawrence River upstream from the Iroquois regulatory structure and by the levels of Lake Ontario and the lower Niagara River; and any change in levels resulting from the works which injuriously affects such rights shall be subject to the requirements of paragraph (a) relating to protection and indemnification.

(e) The hydro-electric plants approved by this Order shall not be subjected to operating rules and procedures more rigorous than are necessary to comply with the provisions of the foregoing paragraphs (b), (c) and (d).

(f) Before the Hydro-Electric Power Commission of Ontario commences the construction of any part of the works, it shall submit to the Government of Canada, and before the entity designated by the Government of the United States commences the construction of any part of the works, it shall submit to the Government of the United States, for approval in writing, detailed plans and specifications of that part of the works located in their respective countries and details of the program of construction thereof or such details of such plans and specifications or programs of construction relating thereto as the respective Governments may require. If after any plan, specification or program has been so approved, The Hydro-Electric Power Commission of Ontario or the entity designated by the Government of the United States wishes to make any change therein, it shall, before adopting such change, submit the changed plan, specification or program for approval in a like manner.

(g) In accordance with the Applications, the establishment by the Governments of Canada and of the United States of a Joint Board of Engineers to be known as the St. Lawrence River Joint Board of Engineers (hereinafter referred to as the "Joint Board of Engineers") consisting of an equal number of representatives of Canada and the United States to be designated by the respective Governments, is approved. The duties of the Joint Board of Engineers shall be to review and coordinate, and, if both Governments so authorize, approve the plans and

specifications of the works and the programs of construction thereof submitted for the approval of the respective Governments as specified above, and to assure the construction of the works in accordance therewith as approved. The Joint Board of Engineers shall consult with and keep the Board of Control, hereinafter referred to, currently informed on all matters pertaining to the water levels of Lake Ontario and the International Rapids Section and the regulation of the discharge of water from Lake Ontario and the flow of water through the International Rapids Section, and shall give full consideration to any advice or recommendations received from the Board of Control with respect thereto.

(h) A Board of Control to be known as the International St. Lawrence River Board of Control (herein referred to as the "Board of Control") consisting of an equal number of representatives of Canada and of the United States, shall be established by this Commission. The duties of the Board of Control shall be to give effect to the instructions of the Commission as issued from time to time with respect to this Order.

During construction of the works the duties of the Board of Control shall be to keep itself currently informed of the plans of the Joint Board of Engineers insofar as these plans relate to water levels and the regulation of the discharge of water from Lake Ontario and the flow of water through the International Rapids Section, and to consult with and advise the Joint Board of Engineers thereon.

Upon completion of the works, the duties of the Board of Control shall be to ensure that the provisions of this Order relating to water levels and the regulation of the discharge of water from Lake Ontario and the flow of

water through the International Rapids Section as herein set out are complied with, and The Hydro-Electric Power Commission of Ontario and the entity designated by the Government of the United States shall duly observe any direction given them by the Board of Control for the purpose of ensuring such compliance. The Board of Control shall report to the Commission at such times as the Commission may determine.

In the event of any disagreement amongst the members of the Board of Control which they are unable to resolve, the matter shall be referred by them to the Commission for decision. The Board of Control may, at any time, make representations to the Commission in regard to any matter affecting or arising out of the terms of this Order with respect to water levels and the regulation of the said discharge and flow.

(i) Upon the completion of the works, the discharge of water from Lake Ontario and the flow of water through the International Rapids Section shall be regulated to meet the requirements of paragraphs (b), (c) and (d) hereof, and, subject as hereinafter provided, shall be regulated in accordance with Method of Regulation No. 5 as prepared by the Department of Transport, Canada, dated September, 1940, and shall be based on the rule-curves forming part of that Method of Regulation. The flow of water through the International Rapids Section in any period shall equal the discharge of water from Lake Ontario as determined for that period in accordance with such Method of Regulation and shall be maintained as uniformly as possible throughout that period.

Subject to the requirements of paragraphs (b), (c) and (d) hereof, the Board of Control, after obtaining the approval of the Commission, may temporarily modify or

change the restrictions as to discharge of water from Lake Ontario and the flow of water through the International Rapids Section set out in this paragraph, for the purpose of determining what modifications or changes therein may be advisable. The Board of Control shall report to the Commission the results of such experiments together with its recommendations as to any changes or modifications in said restrictions. Recommendations as to any changes or modifications which the Commission desires should be made permanent will be referred by the Commission to the two Governments, and if the two Governments thereafter agree, they shall be given effect as if contained in this Order.

(j) Subject as hereinafter provided, upon completion of the works, the works shall be operated initially for a test period of ten years, or such shorter period as may be approved by the Commission with the forebay water level at the power houses held at a maximum elevation of 238.0 feet, sea level datum. Subject to the requirements of paragraphs (b), (c) and (d) hereof, the Board of Control, after obtaining the approval of the Commission, may temporarily modify or change the said forebay water level in order to carry out experiments for the purpose of determining whether it is advisable to increase the forebay water level at the power houses to a maximum elevation exceeding 238.0 feet. If the Board of Control, as a result of these experiments, considers that operation during this test period at a maximum elevation exceeding 238.0 feet would be advisable, and so recommends, the Commission will consider authorizing operation during this test period at a maximum elevation exceeding 238.0 feet. At the end of this test period, the Commission will make such recommendations to the two Governments with respect to a per-

manent forebay water level as it deems advisable or it may recommend an extension of the test period. Such of these recommendations as the two Governments thereafter agree to adopt shall be given effect as if contained in this Order.

(k) The Hydro-Electric Power Commission of Ontario and the entity designated by the Government of the United States shall maintain and supply for the information of the Board of Control accurate records relating to water levels and the discharge of water through the works and the regulation of the flow of water through the International Rapids Section, as the Board of Control may determine to be suitable and necessary, and shall install such gauges, carry out such measurements, and perform such other services as the Board may deem necessary for these purposes.

(l) The Board of Control shall report to the Commission as of 31 December each year on the effect, if any, of the operation of the downstream hydro-electric power plants and related structures on the tailwater elevations at the hydro-electric power plants approved by this Order.

(m) The Government of Canada shall proceed forthwith to carry out its expressed intention to remove Gut Dam.

AND IT IS FURTHER ORDERED that the allocation set out in Appendix "c" of the costs of constructing, maintaining and operating the works approved by this Order between The Hydro-Electric Power Commission of Ontario and the entity to be designated by the Government of the United States be and the same is hereby approved but such approval shall not preclude the Applicants from submitting to the Commission for approval any variation in

the said allocation that may be agreed upon between them as being appropriate or advisable.

AND IT IS FURTHER ORDERED that the Commission retains jurisdiction over the subject matter of these Applications, and may, after giving such notice and opportunity to all interested parties to make representations as the Commission deems appropriate, make such further Order or Orders relating thereto as may be necessary in the judgment of the Commission.

Signed at Montreal, this 29th day of October, 1952.

Signed: A. G. L. McNAUGHTON
A. O. STANLEY
GEORGE SPENCE
EUGENE W. WEBER
J. LUCIEN DANSEREAU

Commissioner ROGER McWHORTER dissenting.

(Dissenting opinion to be filed and attached to this Order.)

APPENDIX A

FEATURES OF THE WORKS APPROVED BY THIS ORDER:

(A) *Channel Enlargements*

Channel Enlargements will be undertaken from above Chimney Point to below Lotus Island, designed to give a maximum mean velocity in any cross-section of the channel which will be used for navigation not exceeding four feet per second at any time, also between Lutus [sic] Island and Iroquois Point and from above Point Three Points to below Ogden Island designed to give a maximum mean velocity in any cross-section not exceeding two and one-quarter feet per second with the flow and at the stage to be permitted on the first of January of any year, under regulation of outflow and levels of Lake Ontario in accordance with Method of Regulation No. 5, as prepared by the General Engineering Branch, Department of Transport, Canada, dated Ottawa, September, 1940. Downstream from the power houses channel enlargements will be carried out for the purpose of reducing the tail water level at the power houses.

Final locations and cross-section of these channel enlargements will be determined from further studies.

(B) *Control Facilities*

Adequate control facilities will be constructed for the regulation of the outflow from Lake Ontario.

(C) *Power House Structures*

The power house structures will be constructed in the north channel extending from the lower end of Barnhart Island to the Canadian shore, and so located that one

structure will be on each side of the International Boundary. Each power house structure will include the main generating units to utilize economically the river flows available to it, with provision for ice handling and discharge sluices.

(D) *Dams and Associated Structures*

A control dam will be constructed extending from Iroquois Point on the Canadian side of the river in an easterly direction to the United States mainland above Point Rockway.

A dam will be constructed in the Long Sault Rapids at the head of Barnhart Island.

Dykes and associated works will be provided as may be necessary in both the Province of Ontario and the State of New York.

All the works in the pool below the control dam will be designed to provide for full Lake Ontario level.

(E) *Highway Modifications*

In both the Province of Ontario and the State of New York provincial and state highways, and other roads, will be relocated in those portions subject to flooding, and reconstructed to standards at least equal to those now in existence.

(F) *Railway Modifications*

Such railway relocations as may be required as a result of the works herein described will be made in the Province of Ontario and the State of New York to standards at least equal to those now in existence.

(G) *Navigation Facilities*

Provision will be made for the continuance of 14-foot navigation throughout the International Rapids Section during the construction period.

(H) *Flooded Areas*

Lands and buildings in both the Province of Ontario and the State of New York will be acquired or rehabilitated as required. Inundated wooded areas will be cleared.

(Appendix B is a map.)

APPENDIX C

1. The power development works under this Application are those specified in Section 8 of the Application.

2. Total costs of the works described in Section 8 shall be based on Canadian costs and United States costs and the total shall be equally divided between the two constructing entities.

3. The costs to be divided should be based on actually experienced and audited expenses.

4. In relation to the three principles above, the three following provisions apply:

(A) The amount to be paid to Canada, as specified in the Agreement of December 3, 1951, between Canada and Ontario, in lieu of the construction by the power-developing entities of facilities required for the continuance of 14-foot navigation, shall be excluded from the total cost

of the power project to be divided between the Canadian and United States power-developing entities, in consideration of the fact that actual replacement of 14-foot navigational facilities will be rendered unnecessary by reason of the concurrent construction of the deep waterway in Canada.

(B) The Authority to be established pursuant to the provisions of the St. Lawrence Seaway Authority Act, Chapter 24 of the Statutes of Canada, 1951 (Second Session), shall contribute an agreed sum of money towards the cost of the channel enlargement which the power-developing entities must undertake in the St. Lawrence River, as set out in paragraph 4 of the Annex to the Canada-Ontario Agreement of December 3, 1951, and in section 8 of the Application to the International Joint Commission, in consideration of the benefits which will accrue to navigation from such channel enlargement.

(C) All costs for construction, maintenance and operation of the project except machinery and equipment in the respective power houses shall be borne equally by the two entities. All costs for construction, maintenance and operation of machinery and equipment in their respective power houses shall be paid by the respective entities and shall be deemed to satisfy the principle of an equal division between the two entities.

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EXHIBIT B

Executive Order No. 10500—Designation of the Power Authority of the State of New York and Establishment of the United States Section of the St. Lawrence River Joint Board of Engineers.

WHEREAS pursuant to the provisions of the Boundary Waters Treaty of January 11, 1909 (36 Stat. 2448), the Government of the United States of America and the Government of Canada on June 30, 1952, filed concurrent and complementary applications with the International Joint Commission for an Order of Approval of the construction, jointly by entities to be designated by the respective Governments, of certain works for the development of power in the International Rapids Section of the St. Lawrence River and of the maintenance and operation of such works; and

WHEREAS the Commission on October 29, 1952, issued an Order of Approval for the construction, maintenance, and operation of such works jointly by The Hydro-Electric Power Commission of Ontario and by an entity to be designated by the Government of the United States, subject to the terms and conditions contained in that Order of Approval; and

WHEREAS condition (g) of the Order of Approval reads in part as follows:

> In accordance with the Applications, the establishment by the Governments of Canada and of the United States of a Joint Board of Engineers to be known as the St. Lawrence River Joint Board of Engineers (hereinafter referred to as the "Joint Board of Engineers") consisting of an equal number of representatives of Canada and the United

States to be designated by the respective Governments, is approved. The duties of the Joint Board of Engineers shall be to review and coordinate, and, if both Governments so authorize, approve the plans and specifications of the works and the programs of construction thereof submitted for the approval of the respective Governments as specified above, and to assure the construction of the works in accordance therewith as approved. * * *

and

WHEREAS the Federal Power Commission on July 15, 1953, issued a license (hereinafter referred to as the License) to the Power Authority of the State of New York for the construction, maintenance, and operation of Project No. 2000, which project represents that portion of the works for the development of power in the International Rapids Section of the St. Lawrence River located within the United States:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes, and as President of the United States, it is hereby ordered as follows:

SECTION 1. *Designation of the Power Authority of the State of New York.* The Power Authority of the State of New York is hereby declared to be the designee of the Government of the United States of America for the construction of the works referred to in the Order of Approval of the International Joint Commission of October 29, 1952.

SEC. 2. *Establishment of United States Section of St. Lawrence River Joint Board of Engineers.* There is hereby established the United States Section of the St. Lawrence River Joint Board of Engineers, composed of

two members and hereinafter referred to as the United States Section. The Secretary of the Army and the Chairman of the Federal Power Commission are hereby designated members. Each may designate an alternate to act for him as a member of the United States Section.

SEC. 3. *Duties of the United States Section.* The United States Section shall represent the Government of the United States on the Joint Board of Engineers in the performance of the duties specified in condition (g) of the Order of Approval, and is authorized to act with the Canadian Section in the approval of the plans and specifications of the works and the programs of construction thereof, submitted for approval of the respective Governments as required by the Order of Approval, and to assure the construction of the works in accordance with such approval.

SEC. 4. *Assistance to the United States Section.* The Department of the Army and the Federal Power Commission are authorized to furnish such assistance, including facilities, supplies and personnel, to the United States Section as may be consonant with law and necessary for the purpose of effectuating this order.

SEC. 5. *Reports to the President.* The United States Section shall submit its final report to the President upon the completion of construction and shall submit such interim reports as may appear to be desirable.

SEC. 6. *Effective date.* This order shall be effective upon the date that the License becomes final.

DWIGHT D. EISENHOWER.

THE WHITE HOUSE, *November 4, 1953.*